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IN THE
COURT OF APPEALS OF INDIANA

SABAS BLANCO,	)	
	)	
Appellant-Petitioner,	)	
	)	
vs.	)	No. 49A02-0606-PC-536
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Respondent.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Amy J. Barbar, Magistrate
The Honorable Robert R. Altice, Jr., Judge
Cause No. 49G02-0207-PC-202594

March 16, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

KIRSCH, Judge

Sabas Blanco appeals the denial of his petition for post-conviction relief from his conviction for murder.[1] He raises two issues, which we restate as:

I. Whether his trial counsel was ineffective for failing to object to the jury instructions on lesser-included offenses and voluntary manslaughter and for failing to tender proper jury instructions; and

II. Whether his appellate counsel was ineffective for failing to raise the issue of the incorrect jury instructions on direct appeal.

We affirm.

FACTS AND PROCEDURAL HISTORY

The facts supporting Blanco's convictions as set forth by this court on his direct appeal are as follows:

> Sabas Blanco and Courtney Blanco were married in 2000 and had a son together, A.B. In March 2002, Blanco and Courtney separated, and Courtney and A.B. moved into an apartment. In early July, Courtney informed [Blanco] that she was not going to reconcile with him.
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> On the morning of July 27, which was Courtney's twenty-second birthday, Courtney called her mother, Lisa Johnson, and told her that she was getting ready to pick up A.B. from Blanco's apartment and that she would bring A.B. over to her house around 7:00 p.m. that night so that she could go out with some friends to celebrate her birthday. Courtney never dropped off A.B. at Johnson's house that night. On the following morning, July 28, Johnson became worried because she could not locate Courtney and A.B. Johnson therefore went to the Beech Grove Police Department and reported her daughter and grandson missing. Based on information from Johnson, the officers proceeded to Blanco's apartment. Because there was no response after they knocked on the door and announced their presence, the officers retrieved a key from the apartment manager and entered Blanco's apartment. Inside, they found Courtney's body on the floor of the bedroom closet. An autopsy later revealed that Courtney died from ligature strangulation.
>
> On July 29, after receiving a tip from a motel employee, the officers arrested Blanco at the Days Inn in Franklin, Indiana, where he had spent the

[1] *See* IC 35-42-1-1.

> previous two nights with A.B. registered under a false name. Blanco was then taken to the Franklin Police Department. After waiving his rights, a detective from the Beech Grove Police Department videotaped an interview with Blanco. During the videotaped interview, Blanco stated that when Courtney came to pick up A.B. on the morning of July 27, "she said she had to leave in a hurry and I told her please stay for a while. And then she said no, I got to go and then . . . so I asked, I got close to her and I was going to give her a happy birthday kiss and she pushed me away . . . ." State's Exhibit 53. Blanco stated that he then grabbed Courtney, threw her to the floor, sat on top of her, and choked her "us[ing] my whole body[.]" *Id.* Blanco explained that after Courtney stopped breathing, he pulled her into the bedroom closet so she could not be seen through the window. During this time, A.B. was in the living room watching television.
>
> The State subsequently charged Blanco with Murder. At trial, the trial court also instructed the jury on lesser-included offenses, including voluntary manslaughter.

Blanco v. State, No. 49A02-0302-CR-123 (Ind. Ct. App. Nov. 26, 2003); *Appellant's App*. at 112-13. Evidence presented at Blanco's trial showed that the force to Courtney's neck was reapplied several times during a struggle that lasted several minutes and maybe as long as fifteen minutes and that the object used to strangle her left a very distinct mark that wrapped all around her neck. *Trial Tr*. at 219-20, 224-26, 233-34.

Because of Blanco's admission to the strangulation, his trial counsel's strategy at trial was to attempt to obtain a conviction on a lesser-included offense of murder by arguing that Blanco acted in sudden heat or without premeditation. *P-C.R. Tr*. at 6-7, 16. Trial counsel argued that the jury instructions given by the trial court were incorrect because they instructed the jury that it must first decide if Blanco was guilty of murder and only after making that determination could it consider the lesser-included offense of voluntary manslaughter. Trial counsel did not otherwise argue that the jury instructions were incorrect and did not tender any additional instructions. The pertinent jury instructions that were given

stated:

FINAL INSTRUCTION NO. 6

The crime of murder, is defined by statute as follows:

A person who knowingly kills another human being, commits Murder, a felony.

To convict the Defendant, as charged in Count 1, the State must have proved each of the following elements beyond a reasonable doubt:

The Defendant, Sabas Blanco

1. knowingly
2. killed
3. Courtney Blanco.

If the State failed to prove each of these elements beyond a reasonable doubt, you cannot find the Defendant guilty. If the State did prove each of these elements beyond a reasonable doubt, you may find the Defendant guilty of Murder, a felony.

FINAL INSTRUCTION NO. 7

Included Offense means an offense that:

1. is established by proof of the same material elements or less than all the material elements required to establish the commission of the offense charged;

2. differs from the offense charged only in the respect that a less serious harm or risk of harm to the same person, property or public interest, or a lesser kind of culpability, is required to establish its commission.

Included in the offense of Murder, a felony, as charged in this case is [sic] the following offenses:

1. Voluntary Manslaughter, a Class B felony, and
2. Involuntary Manslaughter, a Class C felony.

FINAL INSTRUCTION NO. 8

If the State has proven each of the essential elements of Murder, a felony, beyond a reasonable doubt, you may find the Defendant guilty of Murder, a felony. If the State failed to prove each of the essential elements of Murder, a felony, beyond a reasonable doubt, you should find the Defendant not guilty of Murder, a felony, and continue your deliberations as to the lesser-included offense for which you have been instructed, Voluntary Manslaughter, a Class B felony. If the State has proven each of the essential elements of the lesser-included offense of Voluntary Manslaughter, a Class B felony, beyond a reasonable doubt, you may find the Defendant guilty of the lesser-included offense of Voluntary Manslaughter, a Class B felony. If the State failed to prove each of the essential elements of the lesser-included offense of Voluntary Manslaughter, a Class B felony, beyond a reasonable doubt, you should find the Defendant not guilty of that lesser-included offense.

FINAL INSTRUCTION NO. 9

Voluntary Manslaughter is a lesser-included offense of Murder as charged in Count 1. The crime of Voluntary Manslaughter is defined by statute as follows:

A person who knowingly or intentionally kills another human being while acting under sudden heat commits Voluntary Manslaughter, a Class B felony. However, the offense is a Class A felony if it is committed by means of a deadly weapon.

To convict the Defendant of Voluntary Manslaughter, a Class B felony, the State must have proved each of the following elements:

The Defendant, Sabas Blanco

1. knowingly
2. killed
3. Courtney Blanco
4. in sudden heat.

The existence of sudden heat is a mitigating factor that reduces what otherwise would be Murder to Voluntary Manslaughter. However, this sudden heat must have been brought about by sufficient provocation to excite in the mind of the Defendant such emotions as either anger, rage, sudden resentment, or terror as may be sufficient to obscure the reason of an ordinary man and to render the Defendant incapable of cool reflection. The State has the burden of proving beyond a reasonable doubt that the Defendant was not acting under sudden heat. If the State failed to prove each of these elements beyond a reasonable doubt, you cannot find the Defendant guilty. If the State did prove each of

> these elements beyond a reasonable doubt, you may find the Defendant guilty of Voluntary Manslaughter, a Class B felony.

Appellant's App. at 152-55. The jury found Blanco guilty of murder.

On direct appeal, Blanco's appellate counsel argued that the evidence presented at trial was insufficient to support his conviction for murder because the State failed to negate the presence of sudden heat beyond a reasonable doubt. *Pet'r's Ex*. 2. This court affirmed Blanco's conviction and found that the evidence was sufficient to conclude that the State negated Blanco's claim of sudden heat beyond a reasonable doubt. *Appellant's App*. at 111-16. Specifically, this court concluded that, "Courtney's rebuff of Blanco's attempt to kiss her is not sufficient to obscure the reason of an ordinary person, prevent deliberation and premeditation, and render the defendant incapable of cool reflection." *Id*. at 115. Additionally, it was determined that, "because of the prolonged time it took to kill Courtney, including the repositioning of the ligature and her attempt to fight back, Blanco had the opportunity to reflect on his actions and to cease his attempt to choke Courtney." *Id*.

Blanco filed a petition for post-conviction relief alleging ineffective assistance of both his trial and appellate counsel because of the jury instructions related to voluntary manslaughter as a lesser-included offense of murder. After a hearing on his petition, the post-conviction court entered its findings and conclusions denying post-conviction relief. The post-conviction court did find that the jury instructions contained an incorrect statement of the law because they "required the jury to acquit on the murder before proceeding to deciding voluntary manslaughter" and also because they "erroneously included the existence of sudden heat as an element the State must prove." *Id*. at 102. However, the post-

conviction court found that Blanco had not suffered any prejudice because there was no evidentiary predicate for the existence of sudden heat and, therefore, no reasonable probability that the result would have been different even if the jury instructions would have been correct. *Id*. at 103. Blanco now appeals.

DISCUSSION AND DECISION

Post-conviction proceedings do not afford the petitioner an opportunity for a super appeal, but rather, they provide the opportunity to raise issues that were unknown or unavailable at the time of the original trial or the direct appeal. *Ben-Yisrayl v. State*, 738 N.E.2d 253, 258 (Ind. 2000), *cert. denied* (2002); *Wieland v. State*, 848 N.E.2d 679, 681 (Ind. Ct App. 2006), *trans. denied*, *cert. denied*. The proceedings do not substitute for a direct appeal and provide only a narrow remedy for subsequent collateral challenges to convictions. *Ben-Yisrayl*, 738 N.E.2d at 258. The petitioner for post-conviction relief bears the burden of proving the grounds by a preponderance of the evidence. Ind. Post-Conviction Rule 1(5).

When a petitioner appeals a denial of post-conviction relief, he appeals a negative judgment. *McCary v. State*, 761 N.E.2d 389, 391 (Ind. 2002). The petitioner must establish that the evidence as a whole unmistakably and unerringly leads to a conclusion contrary to that of the post-conviction court. *Id.* We will disturb a post-conviction court's decision as being contrary to law only where the evidence is without conflict and leads to but one conclusion, and the post-conviction court has reached the opposite conclusion. *Id*. at 391-92. The post-conviction court is the sole judge of the weight of the evidence and the credibility of witnesses. *Fisher v. State*, 810 N.E.2d 674, 679 (Ind. 2004). We accept the post-

conviction court's findings of fact unless they are clearly erroneous, and no deference is given to its conclusions of law. *Id*.

I. Ineffective Assistance of Trial Counsel

We review ineffective assistance of trial counsel claims under the two-prong test set out in *Strickland v. Washington*, 466 U.S. 668 (1984). *Wieland*, 848 N.E.2d at 681. First, the petitioner must demonstrate that counsel's performance was deficient, which requires a showing that counsel's representation fell below an objective standard of reasonableness and denied the petitioner the right to counsel guaranteed by the Sixth Amendment to the United States Constitution. *Timberlake v. State*, 753 N.E.2d 591, 603 (Ind. 2001), *cert. denied* (2002). Second, the petitioner must demonstrate that he was prejudiced by the counsel's deficient performance. *Id*. To show prejudice, a petitioner must show that there is a reasonable probability that the outcome of the trial would have been different if counsel had not made the errors. *Id*. A probability is reasonable if it undermines confidence in the outcome. *Id*.

We presume that counsel rendered adequate assistance and give considerable discretion to counsel's choice of strategy and tactics. *Smith v. State*, 765 N.E.2d 578, 585 (Ind. 2002). "Isolated mistakes, poor strategy, inexperience, and instances of bad judgment do not necessarily render representation ineffective." *Id*. The two prongs of this test are separate and independent inquiries, and thus, "[i]f it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice . . . that course should be followed." *Williams v. State*, 706 N.E.2d 149, 154 (Ind. 1999), *cert. denied* (2000) (quoting *Strickland*, 466 U.S. at 697).

Blanco argues that his trial counsel was ineffective because of a failure to object to the trial court's jury instructions on lesser-included offenses and the elements of voluntary manslaughter and a failure to tender proper jury instructions regarding these offenses. Voluntary manslaughter is an inherently included offense of murder. *Clark v. State*, 834 N.E.2d 153, 158 (Ind. Ct. App. 2005). Sudden heat is a mitigating factor that reduces the crime of murder to voluntary manslaughter. *Conner v. State*, 829 N.E.2d 21, 24 (Ind. 2005) (citing IC 35-42-1-1; IC 35-42-1-3). "Sudden heat occurs when a defendant is provoked by anger, rage, resentment, or terror, to a degree sufficient to obscure the reason of an ordinary person, prevent deliberation and premeditation, and render the defendant incapable of cool reflection." *Id*. It excludes malice, and neither mere words nor anger, without more, provide sufficient provocation. *Id*. "It is well settled in Indiana that sudden heat is not an element of voluntary manslaughter." *Boesch v. State*, 778 N.E.2d 1276, 1279 (Ind. 2002). Instead, when a defendant presents evidence of sudden heat, the State bears the burden of disproving its existence beyond a reasonable doubt. *Id*. An instruction assigning the burden of affirmatively proving sudden heat to the State is erroneous as a matter of law, and when it is properly objected to at trial may require a new trial on the murder charge. *Id*.

Here, the jury instructions given by the trial court erroneously required the jury to acquit on the murder charge before it could proceed to deciding on the charge of voluntary manslaughter and also erroneously included the existence of sudden heat as an element that the State must prove beyond a reasonable doubt. *See Appellant's App*. at 154-55. Blanco's trial counsel objected to the sequence of Final Instruction No. 8, which required the jury to acquit on murder before it could determine guilt on voluntary manslaughter, but did not

otherwise object to the jury instructions given. *Trial Tr*. at 253-54. Trial counsel did not tender any alternate instructions to remedy his concern regarding the sequence. Although this may have shown deficient performance on the part of Blanco's trial counsel, we must also determine if Blanco suffered any resulting prejudice.

The evidence at Blanco's trial showed that Blanco became angry when Courtney refused to allow him to kiss her. He then grabbed her, threw her to the ground, sat on top of her, and choked her using his whole body. Evidence was also presented that the force to Courtney's neck was reapplied several times during a struggle that lasted several minutes, and maybe as long as fifteen minutes, and that the object used to strangle her left a very distinct mark that wrapped all around her neck. We conclude that Courtney's rejection of Blanco's attempt to kiss her was not sufficient to obscure the reason of an ordinary person and render a person incapable of cool reflection. *See Dearman v. State*, 743 N.E.2d 757, 762 (Ind. 2001) (concluding that defendant was not in such a state of rage or terror by victim's homosexual advances that he was rendered incapable of cool reflection). Additionally, because of the amount of time it took to kill Courtney including the repositioning of the ligature, Blanco had the opportunity to reflect on his actions and to stop choking Courtney. *See id*. (action of lifting and striking a person in the head twice with a large object in a claimed attempt to thwart sexual advances did not indicate that the killing was done in sudden heat and without reflection). Because there was sufficient evidence from which the jury could have found that the State had disproved sudden heat, there was not a reasonable probability that the outcome of Blanco's trial would have been different even if the jury instructions had been correct. Therefore, Blanco has not shown that he was prejudiced by his

trial counsel's performance.

The present case is also distinguishable from the three cases upon which Blanco relies in his argument. In those cases, *Sanders v. Cotton*, 398 F.3d 572 (7th Cir. 2005); *Harrington v. State*, 516 N.E.2d 65 (Ind. 1987); and *Eichelberger v. State*, 852 N.E.2d 631 (Ind. Ct. App. 2006), *trans. denied*, the jury was not properly instructed that the State bore the burden of disproving the existence of sudden heat. *Sanders*, 398 F.3d at 582; *Harrington*, 516 N.E.2d at 66; *Eichelberger*, 852 N.E.2d at 637. The juries in those cases were only told that sudden heat was a mitigating factor, which reduces murder to voluntary manslaughter and that the existence of sudden heat was an element that the State was required to prove to establish a voluntary manslaughter conviction. *Sanders*, 398 F.3d at 577-78; *Eichelberger*, 852 N.E.2d at 635-36. However, in the present case, the jury was explicitly instructed that, "[t]he State has the burden of proving beyond a reasonable doubt that the Defendant was not acting under sudden heat." *Appellant's App*. at 155. Although it may have been clearer for this language to have been included in the Final Instruction No. 6, which dealt with the charge of murder, the jury was instructed that, "it is impractical to embody all applicable law in any one instruction, so in considering any one instruction you should construe it in connection with, and in light of, every other instruction given." *Id*. at 147. Therefore, unlike in *Sanders*, *Harrington*, and *Eichelberger*, the jury in the present case was instructed that the State bore the burden of disproving sudden heat beyond a reasonable doubt. The post-conviction court did not err in denying Blanco's petition for post-conviction relief.

II. Ineffective Assistance of Appellate Counsel

Blanco also argues that his appellate counsel was ineffective because of a failure to allege on direct appeal that the jury instructions given by the trial court were incorrect. We review ineffective assistance of appellate counsel claims using the same standard applicable to claims of ineffective assistance of trial counsel. *Fisher*, 810 N.E.2d at 676. First, the petitioner must demonstrate that counsel's performance was deficient and that he was prejudiced by the counsel's deficient performance. *Id*. at 677; *Benson v. State*, 780 N.E.2d 413, 421 (Ind. Ct. App. 2002), *trans. denied* (2003). Prejudice will be found where there is a reasonable probability that the outcome of the trial would have been different if counsel had not made the errors. *Timberlake*, 753 N.E.2d at 603. Ineffective assistance claims at the appellate level of proceedings generally fall into three basic categories: (1) denial of access to an appeal; (2) waiver of issues; and (3) failure to present issues well. *Fisher*, 810 N.E.2d at 677.

Blanco's claim of appellate counsel's ineffectiveness is based on the second category—waiver of issues. We therefore employ a two-part test to evaluate his claim: (1) whether the unraised issues are significant and obvious from the face of the record; and (2) whether the unraised issues are "clearly stronger" than the raised issues. *Id*. We should not find deficient performance when counsel's choice of some issues over others was reasonable in light of the facts of the case and the precedent available to counsel when that choice was made. *Timberlake*, 753 N.E.2d at 605.

Because Blanco's trial counsel did not object to the incorrect elements jury instruction for voluntary manslaughter, his appellate counsel could only have raised the jury instruction

issue as one of fundamental error. *Boesch*, 778 N.E.2d at 1279. At the time of Blanco's appeal, our Supreme Court caselaw held that a voluntary manslaughter instruction that incorrectly includes the presence of sudden heat as an element to be proven by the State did not constitute fundamental error if the instruction also correctly stated that sudden heat is a mitigating factor that reduces murder to voluntary manslaughter. *Boesch*, 778 N.E.2d at 1279-80; *Isom v. State*, 651 N.E.2d 1151, 1153 (Ind. 1995); *Bane v. State*, 587 N.E.2d 97, 100 (Ind. 1992). In this case, although the voluntary manslaughter instruction given to the jury listed sudden heat as an element of voluntary manslaughter that the State must affirmatively prove, it also included language that stated, "[t]he existence of sudden heat is a mitigating factor that reduces what otherwise would be Murder to Voluntary Manslaughter." *Appellant's App*. at 155. We therefore conclude that given the Supreme Court caselaw at the time of his direct appeal and the facts of this case, the performance of Blanco's appellate counsel was not deficient when he chose not to raise the jury instruction issue on direct appeal, and Blanco did not receive ineffective assistance of his appellate counsel. The post-conviction court did not err in denying Blanco's petition.

Affirmed.

RILEY, J., and FRIEDLANDER, J., concur.